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Utah Supreme Court

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Harvey A. Sjostrom; Attorney for Appellant;

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7277

IN THE SUPREME COURT

of the State of Utah

FRANK SAINT,

Plaintiff and Appellant,

-vs-

ORLANDO JESSE MILLER,

Defendant and Respondent.

APPELLANT'S

REPLY BRIEF

Case No. 7277

Appeal from the District Court of the First Judicial District of the State of Utah, in and for the County of Cache.

Hon. Marriner M. Morrison, Judge.

Harvey A. Sjostrom,

Attorney for Appellant.

FILED

MAR 24 1949

CLERK, SUPREME COURT, UTAH

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IN THE SUPREME COURT OF THE STATE OF UTAH

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FRANK SANT, Plaintiff and Appellant, -vs- ORLANDO JESSE MILLER, Defendant and Respondent.	)	APPELLANT'S REPLY BRIEF Case No. 7277

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Counsel for respondent cites the case of Mingus vs. Olsson, (Utah) 201 Pac. (2) 495 as authority for holding appellant contributory negligent in the instant case. In our opinion it is no authority for in the instant case plaintiff did look and he did see and he did act as an ordinary prudent man under the circumstances, which was not true in that case.

Under the definition of "position of peril" we do not believe it can properly be said that plaintiff was in such a position prior to defendant swerving to the left of the proceeding car. "A position of danger is one from which peril is reasonably probable, not one from which it is merely possible" 7 P. (2)

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1082, 1086, and see 132 P. (2) 838 which says in part "Position of danger" within "last clear chance" doctrine is reached only when plaintiff moving toward path of oncoming train or vehicle has reached a position from which he cannot by exercise of ordinary care escape. And if that be the law, before plaintiff can be charged with contributory negligence we must be able to say that appellant failed to act as an ordinary prudent man would have done after defendant swerved his car to the left from a distance of about 30 feet north where plaintiff and his wife were standing waiting for defendant to pass to the west of them. It was not by plaintiff's action that he was put in "peril" but by respondent in swerving, and if that be true, can it be said that his failure to discover defendant's swerve in time to avoid being struck was an act of commission or omission which amounted to contributory negligence. We believe not and have given our reasons in our former brief and cited authority in support thereof and

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which amounts to this: He had no reason to believe nor would any prudent man under all the circumstances of the case believe or think probable that respondent would suddenly and without giving notice of any kind change his course and thus imperil him or place appellant in danger. And as stated in our first brief with authority cited, he was not negligent in failing to anticipate the negligence of defendant. Nor was appellant negligent of a continuing nature as respondent contends. Such negligence had ceased when he and his wife stopped and waited for defendant to pass to the west of them. The record as already pointed out amply supports this.

A mere reading of respondents cited authorities and cases put as to what constitutes contributory negligence readily shows he has not cited a single case on the facts or analagous thereto to this case and therefor they have no application to the case before this court. All the cases cited are cases of a continuing negligence and were the proximate

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cause of the accident. Here plaintiff had stopped and was acting as an ordinary prudent man under the circumstances.

Counsel further states that plaintiff's wife tried to pull him out of danger. This is not accurate and the record does not show any such "pull". He further states that I, as counsel for plaintiff, suggested answers to be made as to how long plaintiff was stopped. That is not true. It was their testimony and in my opinion was absolutely true.

Counsel further suggests that defendant could not have swerved just prior to the accident because the skid marks were going straight south from evident point of impact. The record and ineluctable logic refute this theory completely.

That it was a case for the jury goes without saying and we renew our request of our first brief for a new trial.

Respectfully submitted,

Harvey A. Sjostrom
Attorney for Appellant.

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